83-1065

No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

THE COUNTY OF ONEIDA, NEW YORK AND
THE COUNTY OF MADISON, NEW YORK,
PETITIONERS,

v.

THE ONEIDA INDIAN NATION OF NEW YORK STATE,
A/K/A THE ONEIDA NATION OF NEW YORK, A/K/A THE ONEIDA
INDIANS OF NEW YORK; THE ONEIDA INDIAN NATION OF
WISCONSIN, A/K/A THE ONEIDA TRIBE OF INDIANS OF
WISCONSIN, INC.; THE ONEIDA OF THE THAMES
BAND COUNCIL; AND THE STATE OF NEW YORK,
RESPONDENTS.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Questions Presented for Review.

1. Whether, assuming that an Indian tribe and the State of New York failed to comply with the Indian Trade and Intercourse Act of 1793 in making a conveyance of land in 1795, the present Indian respondents have a cause of action under federal substantive law against the present occupiers of that land, especially when neither respondents nor petitioners were parties to, or extant at the time of, the conveyance;

2. Whether, in any case, respondents' claim is barred because it was not brought until 175 years after the conveyance;

3. Whether the 1795 conveyance was subsequently ratified by the United States, and is therefore valid and enforceable;

4. Whether respondents' claims present nonjusticiable political questions.

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MISCELLANEOUS.

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THE COUNTY OF ONEIDA, NEW YORK and
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THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a The Oneida Nation of New York, a/k/a The Oneida Indians of New York; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a The Oneida Tribe of Indians of Wisconsin, Inc.; THE ONEIDA OF THE THAMES BAND COUNCIL; and THE STATE OF NEW YORK,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Opinions Below.

The opinion of the Court of Appeals has not yet been reported and is set forth in the appendix. Prior reported opinions, in chronological order, are at 404 F.2d 916 (2d Cir. 1972); 414 U.S. 661 (1974); 434 F. Supp. 527 (N.D. N.Y. 1977); and 622 F.2d 624 (2d Cir. 1980).

Jurisdiction.

The judgment of the Court of Appeals was entered on September 29, 1983. This petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes and Treaties Involved.

1. "An Act to regulate Trade and Intercourse with the Indian Tribes," Act of March 1, 1793, c. XIX, 1 Stat. 329;
2. "An Act to regulate Trade and Intercourse with the Indian Tribes, and to preserve Peace on the Frontiers," Act of May 19, 1796 c. XXX, 1 Stat. 469;
3. Title 25, United States Code, Section 177;
4. Title 28, United States Code, Section 2415;
5. Treaty of Canandaigua, November 11, 1794, 7 Stat. 44;
6. Treaty of September 15, 1795, between State of New York and Oneida Nation of Indians;
7. Treaty of June 1, 1798, between State of New York and Oneida Nation or Tribe of Indians; and
8. Treaty of June 4, 1802, between State of New York and Oneida Nation or Tribe of Indians.

Because of their length, the statutes and treaties above are set forth in the appendix.

Statement of the Case.

This is a test case, explicitly so brought by respondents and explicitly so decided by the District Court. Ostensibly, however, it is an action to recover damages for the wrongful occupation of 871.92 acres of land in New York State for the years 1968 and 1969. Respondents, plaintiffs below, are the Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin, and the Oneida of the Thames Band Council ("respondents"). Petitioners, the Counties of Madison and Oneida, New York ("the Counties"), are the record owners of the subject lands. The Counties seek review of the judgment of the Court of Appeals affirming a finding of liability.[1]

The essence of the reasoning and judgment below is that a 1795 treaty transferring a vast tract of land from the Oneida Indian Nation to the State of New York was unlawful, and hence void; that every subsequent transfer of any land within that tract is also void; and that therefore the Counties, and all others similarly situated, do not own, and never have owned, any of the subject land. Defenses premised upon the innocence and good faith of the defendants and the intervening passage of nearly two centuries have been summarily rejected as a matter of law.

It is perhaps unsurprising that this lawsuit has an unusually long history, which includes a previous review by this Court. The complaint was filed by the Oneida Indian Nation of New York and the Oneida Indian Nation of Wisconsin in the United States District Court for the Northern District of New York on February 5, 1970.[2] It alleged that the State of New York and the Oneida Indian Nation entered into a treaty on September 15, 1795, whereby the Oneidas transferred approximately 100,000 acres of land to the State in return for a perpetual

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[1] The Court of Appeals also affirmed a judgment that the State of New York must indemnify the Counties for any damages owed to the Indian respondents, a holding as to which the Counties do not seek review.

[2] The Oneida of the Thames Band Council intervened as plaintiff during the liability phase of the trial.

annuity, and further alleged that no officer of the United States was present at the execution of that treaty and that the treaty was not consented to nor ratified nor approved by the United States. Respondents claimed that the treaty therefore violated the "Indian Non-Intercourse Act," 1 Stat. 137, that the transfer was thus invalid, and that, because the Counties occupied parts of the treaty area for various public improvements, the Counties were "indebted" to respondents for the fair rental value of the land for the period of January 1, 1968, through December 31, 1969.[3]

The District Court dismissed the action for lack of federal question jurisdiction in an unpublished opinion on November 11, 1971. The Court of Appeals affirmed. 464 F.2d 916 (2d Cir. 1972). This Court reversed and remanded, holding that for jurisdictional purposes the complaint sufficiently "asserted a current right to possession conferred by federal law, wholly independent of state law." 414 U.S. 661, 666 (1974). This Court, however, did not rule on whether federal substantive law in fact provided respondents' asserted cause of action; it held only that the claim was not state-law based, and was not so frivolous as to preclude federal jurisdiction to decide the substantive questions.

On remand, the Counties filed third-party complaints seeking indemnity from the State of New York. The District Court then trifurcated the case, trying the issue of the Counties' liability to respondents first, damages second, and reserving the question of the claims against the State for last. A three-day trial was held on liability, and the District Court issued its findings on July 12, 1977, in a decision reported at 434 F. Supp. 527 (N.D. N.Y. 1977).

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[3] The statute appearing at 1 Stat. 137 is the first Trade and Intercourse Act, which was enacted in 1790. The actual statute, if any, violated in 1795 was the Trade and Intercourse Act of 1793, enacted on March 1, 1793, c. 19, § 8, 1 Stat. 329. See text, *infra*, at 5, n.4.

In that decision, the court first held that the Oneida Indian Nation of New York constituted a tribe within the meaning of the Trade and Intercourse Act, and that it and the other plaintiffs were the "direct descendants" of the original Oneida Indian Nation. 434 F. Supp. at 538. It then found that the land involved was covered by the 1793 Act, as the "aboriginal home land of the Oneidas, later confirmed in treaties with the United States Government . . .." *Id.* Next, the court held that no United States commissioner was present in Albany at the consummation of the treaty, and it rejected arguments that the United States had subsequently consented to or ratified the transaction. 434 F. Supp. at 538-540. Finally, it found that the trust relationship between the Oneidas and the United States was neither terminated nor abandoned. 434 F. Supp. at 540. The court held that "[a] prima facie case of violation of the Nonintercourse Act, 25 U.S.C. § 177, has been established," *id.*, and concluded that as a result, respondents' "right of occupancy and possession to the land in question was not alienated." 434 F. Supp. at 548.[4] Thus, the court stated, "By the deed of 1795, the State acquired no rights against [respondents]; consequently, its successors, the defendant counties, are in no better position." *Id.*

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[4] As noted above, the actual statute, if any, which was violated was the Trade and Intercourse Act of 1793. *See* text, *supra*, at 4 n.3. That statute, like the 1790 Act which preceded it, was temporary in nature, and provided that it should be "in force, for the term of two years, and from thence to the end of the then next session of Congress, and no longer." 1 Stat. 329, § 15. The 1793 Act was repealed and replaced by a new Trade and Intercourse Act in 1796. Act of May 19, 1796, c. 30, 1 Stat. 469. Expanded and strengthened Trade and Intercourse Acts were in turn enacted in 1799, 1802, and 1834. Act of March 3, 1799, c. 46, 1 Stat. 743; Act of March 30, 1802, c. 13, 2 Stat. 139; Act of June 30, 1834, c. 161, 4 Stat. 729. The last of these acts was codified in its present form in 1874. *See* 25 U.S.C. § 177, note. The Counties contended below that all actions and disabilities under the 1793 Act were preserved only until 1799, and then abated, but that argument was rejected. *See* Slip Op. at 6735.

In finding liability against the Counties, the District Court rejected a number of affirmative defenses as a matter of law, including the statute of limitations, laches, adverse possession, and bona fide purchaser for value. While it noted at the outset that the "impact of the Oneidas' claim will reach far beyond the boundaries of the present suit," and that "[t]he potential for disruption in the real estate market is obvious and is already being felt," it apparently concluded that it had no choice but to order the "disruption and individual hardships" that the litigation would inevitably entail. 434 F. Supp. at 531.[5]

During the period from late 1977 through mid-1981, the District Court addressed various motions filed by respondents and the Counties. Most significantly for present purposes, the court ruled on two motions for summary judgment submitted by the Counties. First, in May, 1979, it rejected the Counties' contention that the respondents' claims were precluded by a 1978 finding of liability against the United States on a claim which respondents had previously filed before the Indian Claims Commission. That claim sought damages from the United States on the grounds that it failed to prevent the 1795 conveyance to New York. *Oneida Indian Nation of New York* v. *United States*, 43 Ind.Cl.Comm. 373 (1978).[6]

Second, in May, 1981, the District Court rejected a motion by the Counties questioning its authority to fashion a damages

[5] The District Court at that point certified the question "whether a violation of the Nonintercourse Act in 1795 gives rise to a claim against the present record owners" under 28 U.S.C. § 1292(b), *id.*, but this appeal was later withdrawn by the Counties. It was at this juncture in the proceedings that the present counsel to the Counties entered the case.

[6] The District Court certified this issue under 28 U.S.C. § 1292(b). The Court of Appeals first took the Counties' appeal, but later dismissed it on the grounds that the District Court had improvidently certified the issue because the judgment of the Indian Claims Commission was not final. The opinion of the Court of Appeals is reported at 622 F.2d 624 (2d Cir. 1980).

remedy because of the political question doctrine and this Court's recent decisions concerning the appropriate roles of Congress and the federal judiciary in developing remedies.[7] The District Court ruled that the political question doctrine was inapplicable and that, by finding federal question jurisdiction in this case in 1974, this Court had implicitly found a federal common law cause of action authorizing it to grant respondents the damages relief they sought.

In October, 1981, the District Court concluded a trial on the damages to be assessed against the Counties. The court found that the Counties occupied 871.92 acres of land in the treaty area, including a park, a fire department radio tower, a gravel bed, and approximately 125 miles of highways and bridges. It specifically found that the Counties did not exist in 1795 (and thus could not have participated in the transaction complained of), that "[n]o evidence has been presented to show that [the Counties] acted other than in good faith," and that none of the present improvements existed in 1795. The court also concluded that respondents were not excluded from using the subject land, that respondents had received compensation from the State as a result of the 1795 treaty, and that they had never refused or returned any of that compensation.

Because of the Counties' good-faith occupation, the District Court assessed the value of the occupied lands as if they were unimproved, thus effectively permitting the Counties to offset the value of the improvements. In addition, analogizing to eminent domain actions involving highway easement condemnations, the court calculated the fair rental value of the highway lands at 90% of the value of the property. Accordingly, the court awarded $9,060 damages against Madison County

[7] *See, e.g., Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979); *California* v. *Sierra Club*, 451 U.S. 287 (1981); *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981).

and $7,634 damages against Oneida County, plus annual interest at 6%, for the fair rental value of the land in the years 1968 and 1969.

Finally, in May, 1982, the District Court granted a motion by the Counties for summary judgment against the State on their third-party complaints, holding the State liable to indemnify the Counties. The court's ruling was based on equitable indemnity principles, and was premised on the finding that the State was the actual wrongdoing party. The court rejected the State's argument that the claim was barred by its Eleventh Amendment immunity, holding that any such immunity was waived.

Final judgment was entered in the District Court on May 11, 1982, and all parties appealed. On September 29, 1983, a sharply divided Court of Appeals affirmed the finding of liability over a strongly-worded dissent. The majority, composed of Senior Circuit Judges Lumbard and Mansfield, rejected the contentions that respondents did not have a cause of action under federal law, that any such claim abated with the expiration of the 1793 Act, that the claim was time-barred or non-justicable, and that the United States subsequently ratified the 1795 transaction. Slip Op. at 6719-41. It also affirmed the judgment against the State. *Id.* at 6747-52.

As to the damages issue, the majority affirmed all but two aspects of the judgment below. Although the District Court had specifically found that the Counties did not exist in 1795 and that no countervailing evidence suggesting bad faith by the Counties had been offered, the majority held that the Counties had the burden of proving their good faith up to the present time. The majority stated that it was "not prepared" to overturn the lower court's finding of good faith, but remanded for "clarification" of that issue. *Id.* at 6746. The majority also ruled that the use of the 90% valuation as to the fair rental value of the highway lands was erroneous, and remanded for purposes of recalculating the damages at 100%. *Id.*

Judge Meskill wrote a vigorous dissent. He first pointed out that the majority was inviting "potentially staggering claims" on what he called "skimpy authority." *Id.* at 6752. He then stated that the problem was essentially a political one, which Congress, not the judiciary, should address, and that in any event Congress had established administrative procedures to resolve Indian land claims. Finally, he examined the applicable law and concluded that neither the Trade and Intercourse Act nor federal common law would support the private right of action claimed by respondents. *Id.* at 6754-6762.

Reasons for Granting the Writ.

I. The Judgment Below Disturbs Nearly Two Centuries of Good Faith Possession by Innocent Landowners and Has Potentially Catastrophic Consequences for Governments and Property Owners Throughout the Eastern United States.

The importance of this action goes far beyond the 800-plus acres of land and $16,000 immediately at stake. As freely acknowledged by both respondents and the courts below, implicit in the judgment is a finding that thousands of individuals and entities, in an area covering more than 150 square miles in the heart of central New York State, are now "trespassers" — notwithstanding 188 years of open and notorious good faith occupation, acquiesced in by respondents, their predecessors, and Congress. Thousands may be bankrupted, and their homes, farms, and businesses may be forfeited, in order to satisfy the claims of the purported descendants of an Indian tribe which admittedly sold the land nearly two centuries ago.

The eventual sum of damages arising out of this action could easily run into hundreds of millions of dollars. The Counties alone may be liable for nearly two centuries' worth of "trespass" damages, plus accrued interest; the liability of most present landowners will be measured only by decades, but should prove staggering enough to devastate thousands of individuals and businesses. Those landowners who have occupied their land the longest, and who thus have the greatest investment to lose, will presumably pay the greatest amount.

A finding of wrongful occupation, moreover, not only implies a right to trespass damages, but may also imply a right to eject the present occupiers.[8] Under ordinary circumstances, the prospect of forcing innocent homeowners to vacate their property in order to vindicate a 186-year-old claim would be unthinkable. Here, however, the court below, rather than precluding any such consequences, explicitly contemplated them. Indeed, if the ruling below is to be given any credence, ejectment would appear to be necessary to prevent future "wrongs" against the respondents; otherwise, the persons who occupy land in the treaty area will commit a new trespass, with new liabilities, every day that they awake or set foot upon their property. Needless to say, the disruption caused by an order of ejectment would be so wide-ranging as to be almost inconceivable.[9].

[8] As the judgment presently stands, those persons who are required to pay damages to respondents may at least take some comfort in the fact that the State may be bankrupted in order to meet its indemnity obligations. There is not, however, any present assurance that the State will be required to pay compensation to those whose property is taken away.

[9] Any assurances by respondents that they would seek no such relief ring hollow in light of the disruptions they have already caused to property owners in the treaty area, and in light of the fact that they have already filed an action for ejectment against twenty-three landowners. *See* text, *infra* at 11 n.10. At best, those persons who would continue to live in the treaty area would do so only at the sufferance of respondents, who will presumably be free to eject offending landowners at their pleasure.

The threat of further litigation involving lands within the 1795 treaty area is not fanciful. Two additional actions brought by respondents directed to portions of that land are presently pending in the District Court.[10] In addition, respondents have continuously characterized this as a "test case," thereby strongly suggesting that further actions will be filed. If the rule against claim-splitting does not bar future actions, the principles of res judicata, collateral estoppel, and stare decisis may make respondents' path to additional judgments very clear, indeed. Whether respondents will exercise their rights to the fullest extreme, or will be content to bring suit against only such defendants as they find displeasurable, remains to be seen.

As catastrophic as the impact of this litigation may be upon property owners in the 100,000-acre area covered by the 1795 treaty, in actuality it is but the tip of the iceberg. Vast portions of the eastern United States were, or may have been, transferred by Indian tribes in the late eighteenth and early nineteenth centuries without the consent or approval of the United States. The Oneida Indian tribe alone executed more than 25 treaties with the State of New York between 1788 and 1846; the Court of Appeals remarked in dictum below that only two of those treaties were made with federal supervision and approval. Slip Op. at 6717. Respondents have already filed suit seeking damages and to be "restored" to "immediate possession" of a five to six million acre tract of land extending from Pennsylvania to the Canadian border, an area larger than Massachusetts or New Jersey. A hearing on various factual issues in that action is presently scheduled for the spring of

[10] *Oneida Indian Nation* v. *County of Oneida*, 74-CV-187 (N.D.N.Y.) (action for damages challenging approximately twenty-five treaties with New York State); *Oneida Indian Nation* v. *Williams*, 74-CV-167 (N.D. N.Y.) (action for ejectment against twenty-three landowners).

1984. *See Oneida Indian Nation of New York* v. *New York*, 691 F.2d 1070 (2d Cir. 1982).

Two other claims by Indian groups are currently pending in the Northern District of New York. An action by two entities claiming to be "direct descendants" of the Cayuga Indian nation is presently pending in the District Court, and the complaint in that action expressly promises that a further claim will be brought to recover an additional three million acres. *See Cayuga Indian Nation of New York* v. *Cuomo*, 565 F. Supp. 1297 (N.D. N.Y. 1983). Another claim has been filed by a group calling itself The Canadian St. Regis Band of Mohawk Indians. *See Canadian St. Regis Band of Mohawk Indians* v. *New York*, 97 F.R.D. 453 (N.D. N.Y. 1983). Other actions may yet follow; as noted by the Court of Appeals, at least one authority has estimated that the "State of New York acquired from the Indians all the western one-half of that state by nearly 200 treaties not participated in by the United States Government." Slip Op. at 6717 n.5, quoting F. Cohen, Handbook of Federal Indian Law, 420 n.24 (1942 ed.).

Nor are the claims limited to New York State. In the wake of this Court's 1974 decision upholding federal question jurisdiction in this action, a number of similar lawsuits were filed in federal courts from Maine to Louisiana.[11] Indeed, one Indian group, styling itself as the "Houdenosaunee," or "Six Nation Iroquois Confederacy," has attempted by seeking intervention in this case and others to lay claim to virtually the entire Northeast. Other lawsuits have been threatened, and others yet may one day be filed.[12] The magnitude of the disruption which these claims threaten is virtually unparalleled in American jurisprudence.

As if the sheer enormity of the potential claims were not imposing enough, to make matters worse, many of these lawsuits are practically indefensible as the law now stands. As Judge

[11] Reported decisions outside of New York State have included *Catawba Indian Tribe of South Carolina* v. *South Carolina*, No. 82-1671 (slip op.) (4th Cir., Oct. 11, 1983); *James* v. *Watt*, 716 F.2d 71 (1st Cir. 1983); *Mohegan Tribe* v. *Connecticut*, 638 F.2d 612 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), *on remand*, 528 F. Supp. 1359 (D. Conn. 1982); *Epps* v. *Andrus*, 611 F.2d 915 (1st Cir. 1979); *Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979), *cert. denied*, 444 U.S. 866; *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 (1st Cir. 1975); *Mashpee Tribe* v. *Watt*, 542 F. Supp. 797 (D. Mass. 1982), *aff'd*, 707 F.2d 23 (1st Cir. 1983); *Schaghticoke Tribe of Indians* v. *Kent School Corp.*, 423 F. Supp. 780 (D. Conn. 1976); *Narragansett Tribe of Indians* v. *Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D. R.I. 1976). Other unreported cases have included *Wampanoag Tribal Council of Gay Head, Inc.* v. *Town of Gay Head*, No. 74-5826-MCN (D. Mass., filed 1974); *Christiantown Tribe* v. *Watt*, No. 81-3206-S (D. Mass., filed 1981); *Chappaquiddick Tribe* v. *Watt*, No. 81-3207-S (D. Mass., filed 1981); *Herring Pond Tribe* v. *Watt*, No. 81-3208-S (D. Mass., filed 1981); *Troy Tribe* v. *Watt*, No. 81-3029-S (D. Mass., filed 1981); *Chitimacha Tribe* v. *Harry L. Laws Co.*, No. 770-772L (W.D. La., filed 1977); *Western Pequot Tribe of Indians* v. *Holdridge Enterprises, Inc.*, Civil No. 76-193 (D. Conn., filed 1976).

[12] The Indian Claims Limitation Act of 1982, Pub. L. 97-394, required the Secretary of the Interior to publish in the Federal Register "a list of all claims accruing to any tribe, band or group of Indians or individual Indian on or before July 18, 1966," which had been identified or submitted to the Secretary, for statute of limitations and various other purposes. The Secretary was given the discretion "to exclude from such list any matter which was erroneously identified as a claim and which has no legal merit whatsoever."

Pursuant to that statute, lists were published in the Federal Register on March 31 and November 7, 1983. Twenty-one separate claims were listed in the "Eastern Area" as "Aboriginal Land Claims" or "Nonintercourse Act Land Claims." The groups listed included the Catawba; St. Regis; Oneida; Cayuga; Gay Head Band of Wampanoag; Western Pequot; Schaghticoke; Mohegan; Shinnecock; Seminole; Chitimacha; Tunica Biloxi; Stockbridge Munsee; Houma; Eastern Pequot; Alabama-Coushatta Tribe of Texas; and the Tiqua Tribe of El Paso, Texas. 48 Fed. Reg. 13698, 13920 (Mar. 31, 1983); 48 Fed. Reg. 51204, 51252 (Nov. 7, 1983). The land involved was not named, but presumably includes lands in Massachusetts, Connecticut, New York, Wisconsin, South Carolina, Florida, Mississippi, Louisiana, and Texas.

Lumbard noted in *Mohegan Tribe* v. *Connecticut*, 638 F.2d 612, 614-615 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981):

> To date, the Indians have been largely successful in their legal battles regarding their claims to eastern lands. . . . The only grounds upon which the states have thus far succeeded in defeating Indian claims is in demonstrating that plaintiffs in these suits do not properly represent an existing tribe which can be proved to be the legitimate descendant of the original landholding tribe.

Furthermore, nothing that the current occupiers of land can do, short of abandoning their property, can mitigate the amount of their liability. Even the passage of time will not bring them repose, for the lower courts have consistently rejected every form of temporal defense. *See id.* at 615 n.3, and cases cited therein.

Two of the actions listed in footnote 11 above have been settled by acts of Congress. Rhode Island Indian Claims Settlement Act of 1978, 25 U.S.C. §§ 1701-1716; Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735. The practical result of those enactments has been to suffuse the remaining litigation with an air of unreality; the courts seem to have silently assumed that Congress will eventually step in as a *deus ex machina* and bring these claims to a satisfactory resolution. It is difficult to believe, for example, that the courts below in this action would have been so quick to find liability against the Counties if they genuinely expected that thousands of innocent persons would be forced to relinquish their homes and businesses as a result.

This, however, should not be an exercise in pressure politics or judicial brinksmanship; it's a real lawsuit, with real parties in interest. Its mere existence has affected the real estate market in the treaty area. Even as this petition is being prepared, the title to every home, farm, and business is clouded,

with attendant economic consequences to those who try to improve or sell their property or use it as a security for an obligation. The people of Madison and Oneida Counties deserve at least the same solicitude from the courts of the United States as an Indian tribe of the eighteenth century which no longer exists and its alleged descendants, who slept on whatever rights they may have had for 175 years.

This action was the first of the eastern Indian land claims to be filed, and this Court reviewed the jurisdictional issues it presented almost a decade ago. It has continued to serve as the touchstone for more than a score of similar claims across the eastern United States. District court after district court, and numerous panels of courts of appeals, have been compelled to wrestle with one or more of the novel questions of substantive federal law decided in this case; to date, their decisions have evaded review by this Court due to their necessarily interlocutory nature and the basic purpose of the claimants, which is to force large, pre-judgment settlements. This case, however, has reached a judgment for the plaintiffs, the first of its nature to do so. It is again ripe for review. Because its consequences are so potentially devastating to so many thousands of governments and private landowners, this Court should grant the petition to review the judgment of the court below.[13]

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[13] Although the Court of Appeals remanded this action for "clarification" on two minor damages issues, that hearing will be unnecessary in the event that this Court reverses the judgment of liability. The status of the present action is thus akin to instances where a court of appeals has reversed the granting of a motion to dismiss and remanded an action for trial. *See, e.g.*, *Estelle* v. *Gamble*, 429 U.S. 97, 98 (1976). Furthermore, as noted above, the decision of the Court of Appeals presents "novel and important" issues of law, *American Construction Co.* v. *Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 387 (1893), which are "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945).

Finally, and most importantly, the remand will be at best an empty exercise. The District Court can adjust the damages from 90% of value to 100%

II. The Judgment Below is the First Final Judgment for a Plaintiff in Any of the Numerous Eastern Indian Land Claims Filed Subsequent to this Court's 1974 Decision in this Case Upholding Federal Jurisdiction, and as Such it Presents Novel and Important Questions of Federal Substantive Law which have Not Been and Should Now Be Considered by This Court.

This Court's 1974 decision in this action settled the question of whether federal jurisdiction existed, but raised a host of others in its stead. Did respondents have a cause of action? If so, what was its source? Could such a claim be heard after so long a time? Could such a claim, with its complicated web of historical, sociological and political issues, be heard at all? Because no lawsuit of this nature had ever been brought before, the legal waters were murky and uncertain. In the end, the lower courts simply stretched and pieced together diverse scraps of real property, procedural, trust, and Indian law under an overlay of legal fictions whereby Indian plaintiffs are considered sovereign nations for some purposes and incompetent wards for others. The ultimate effect of that process was that federal courts began to adjudicate centuries-old claims for possession, ownership, and sovereignty over millions of acres of vastly-improved lands as if they were ordinary title disputes between squabbling neighbors or heirs.

The result, at least in this instance, is one of the most extraordinary judgments ever handed down by an American court. Whether the Oneida Nation ever suffered any loss or injury has been deemed to be irrelevant; so has the fact that the Oneida Nation as such no longer exists and is thus not a party

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with a simple calculation, and no one, including respondents, has ever challenged the Counties' good faith in occupying the land in question. To delay decision in this action for another one or two years, while thousands of land titles remain in doubt, would simply serve no useful purpose.

to this lawsuit. Whether the Counties were innocent of any wrongdoing has also been deemed to be irrelevant, at least for purposes of establishing liability. The fact that the lawsuit will directly lead to judgments of staggering proportions has been dismissed almost airily. The events upon which the rights of the parties turn occurred almost two centuries ago, yet none of the usual time-barring doctrines — such as statute of limitations, laches, and estoppel — have been held to apply. Indeed, the dexterity with which the courts below removed every conceivable obstacle to the maintenance of this action was nothing short of remarkable.[14] The result, in short, is that a two-hundred-year-old lawsuit, brought by plaintiffs who were not themselves injured, against defendants who did not commit any wrong, may lead to judgments measuring in the billions of dollars and vast disruptions over millions of acres of property.

The ostensible purpose behind the rulings below is in some ways more remarkable yet. The "wrong" which the judgment seeks to vindicate is *not* that the land was bought from the Oneidas for an inadequate price; rather, it is the fact that *no United States commissioner was present at the signing of the treaty on September 15, 1795*. Had Joseph Hopkinson, who was present at the Treaty of June 1, 1798, or John Tayler, who was present at the Treaty of June 4, 1802, been in Albany when the treaty was signed, this action could not have been maintained, for no violation of law would have occurred. It is also worth noting that the purpose of the Trade and Intercourse Act, at least in the 1790's, was *not* solicitude for the Indians, as helpless wards of the government; it was to attempt to preserve peace along the frontier between the Indian country and the white settlers, while effecting the orderly removal of the Indians in favor of the advancing whites. *See* Slip Op.

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[14] In this regard the District Court was guided at least in part by what it believed was a mandate from this Court to provide a remedy to respondents.

at 6759 (Meskill, J., dissenting).[15] These are the immutable principles of law for which thousands of titles — representing untold years of savings, sufferings, and deprivations by innocent individuals — may be declared worthless pieces of paper.

Because of the novelty of the issues, this action presents a dozen or more questions worthy of the consideration of this Court. The Counties, however, request that the Court grant the petition to review but four central questions:

(1) Do respondents have a cause of action under federal law against the present occupiers of the treaty land?

The Trade and Intercourse Act provides no express right of action, but the Court of Appeals held that respondents had both an action under federal common law and an implied private right of action under the Act. Slip Op. at 6719-35. The position of the Counties as to that holding is stated succinctly by the dissenting opinion below, and thus will only be outlined here: no common law right of action such as this ever existed; even if, *arguendo*, it did, it was clearly preempted by the Trade and Intercourse Acts, which provided comprehensive criminal and administrative enforcement mechanisms and controls that were unusually elaborate for the late eighteenth century; and no private right of action should be implied under the standards of *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353 (1982) and *Cort* v. *Ash*, 422 U.S. 66 (1975), chiefly because of the overwhelming evidence that the Second Congress could not have intended any such result.

(2) May this action be brought after the passage of 175 years, or is it time-barred?

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[15] It cannot even be maintained that the court below was engaging in strict adherence to statutory command, for the private right of action which respondents claim is nowhere set forth in any statute. *See* text, *infra* at 18.

The Court of Appeals held that respondents were not subject to state law delay-based defenses, on the grounds that the United States as trustee of a tribe would not be subject to such defenses and that it would be "anomalous to allow the trustee to sue under more favorable conditions than those afforded the tribes themselves." Slip Op. at 6736. As for a federal time bar, the court first stated that the statute which governs suits brought by the United States itself, 28 U.S.C. § 2415, provided "some guidance," noting that under that statute the claim would not be barred if brought by the United States, and accordingly held that respondents should not be barred. Slip Op. at 6736-37.

The error below is that 28 U.S.C. § 2415, as its language and history plainly indicate, was most definitely *never* intended by Congress to apply to suits brought by tribes themselves rather than those brought by the United States as a trustee.[16] Even to turn for "guidance" to that statute thus clearly flouts Congressional intent. As is well settled by the decisions of this Court, when no federal statute of limitations is applicable, the proper cause is to incorporate into federal law and apply the most nearly analogous statute of limitations of the state in which the court sits. *See, e.g., Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946). It virtually goes without saying that a 175-year old action is barred by the statute of limitations of New York; indeed, the longest limitation period of *any* kind

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[16] *See, e.g.*, 123 Cong. Rec. 22166 (July 11, 1977) (remarks of Mr. Cohen); *id.* at 22168 (remarks of Mr. Dicks); *id.* at 22499 (July 12, 1977) (remarks of Mr. Cohen); *id.* at 22500 (remarks of Mr. Foley); *id.* at 22507 (remarks of Mr. Dicks); *id.* at 22509 (remarks of Mr. Studds); *id.* at 22510 (remarks of Mr. Yates); Statute of Limitations Extension: Hearing Before the U.S. Senate Select Committee on Indian Affairs, 96th Cong., 1st Sess., 11 (December 17, 1979) (remarks of Mr. Walker); 126 Cong. Rec. S1641 (February 20, 1980) (remarks of Senator Melcher); *id.* at S1642 (remarks of Senator Cohen).

under that state's law is twenty years. *See* N.Y. Civ. Prac. Law § 211. Moreover, the fact that the United States might be able to sue, even though respondents could not, is far from anomalous, for real and significant differences exist between the interests of the United States and those of the respondents. *See United States* v. *Minnesota*, 270 U.S. 181, 195 (1926) (disparity of rights and status is a reason for *permitting* United States to sue when Indian wards cannot). In fact, the United States refused to assist in the prosecution of this claim, when requested to do so by respondents, on the grounds that the existence of the claim before the Indian Claims Commission made any further government action unnecessary. *See Oglala Sioux Tribe of the Pine Ridge Indian Reservation* v. *United States*, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

Moreover, the statute found to have been violated here, the 1793 Trade and Intercourse Act, was a temporary statute, which by its terms expired in 1796, and the 1796 and 1799 Trade and Intercourse Acts expressly preserved actions and disabilities for violations of the 1793 Act only until 1799. The unenforceability of conveyances is a classic form of disability. *See* Black's Law Dictionary 223 (rev. 5th ed. 1979). It and the respondents' action have therefore abated. *See Norris* v. *Crocker*, 54 U.S. 429 (1851); *United States* v. *Mack*, 73 F.2d 265, 266 (2d Cir. 1934), *rev'd on other grounds*, 295 U.S. 480 (1935).

(3) Was the 1795 transaction subsequently ratified by the United States?

The Court of Appeals conceded that the first two subsequent treaties between the Oneida Nation and the State of New York, both of which were federally approved, made specific reference to the 1795 transaction. *See* Treaty of June 1, 1798; Treaty of June 4, 1802. It concluded, however, that because "plain and unambiguous" Congressional intent in an

enactment would be required to extinguish Indian land title, the same standard would be applied to ratification; accordingly, the court refused to find that the treaty had been ratified. Slip Op. at 6739-41.

It is well-settled, however, that subsequent ratification of transfers of Indian lands need not be express, but may be implied from the acts and conduct of the federal government. *See, e.g., Seneca Nation* v. *United States*, 173 Ct. Cl. 912 (1965); *United States* v. *National Gypsum Co.*, 141 F.2d 859 (2d Cir. 1944). The specific references to the 1795 treaty are ample evidence of an intent to ratify. Furthermore, as the maps of the treaty area indicate, if the 1795 treaty were not valid, one would have to ascribe to the United States in 1798 and 1802 an irrational intent to acquire nonsensically circumscribed tracts of land, including one tract floating unattached in a sea of Indian country.

(4) Does this action present solely non-justiciable political qOestions?

The Court of Appeals rejected the contention that the claim presented a non-justiciable political question under the principles of *Baker* v. *Carr*, 369 U.S. 186, 208-217 (1962). In brief, the Counties first maintain that the determination of the lawfulness of and remedy for their occupancy has been committed to the President, both under Section 5 of the Trade and Intercourse Act of 1793 and Article VII of the 1794 Treaty of Canandaigua between the United States and the Six Nations of the Iroquois. Respondents in fact presented their case twice to the President shortly before filing this action, and their request for assistance was declined. Second, the determination of this claim necessarily entails a political choice among four feuding factions (the Oneida groups in New York, Wisconsin, and Ontario and the so-called "Houdenosaunee") as to which is the proper entity to be the sovereign government of the area in question, and which should receive the monetary benefits of

this lawsuit. Finally, judicial determination of the questions involved may lead to potential embarrassment from multifarious pronouncements by various departments; the political branches have been repeatedly contacted by respondents, but have declined to seek or implement the remedy ordered by the courts below.[17]

A further element to the political question issue was articulated by the dissent below:

> This is not to deny the wrongs that Indian tribes have suffered. They do exist and surely require attention. However, the remedy should not be created by a court of law acting in an environment of legal uncertainty. These are essentially political problems which require a comprehensive solution that the judiciary cannot provide in one sitting.

Slip op. at 6753 (footnote omitted). As this Court does not need to be reminded, the history of the aboriginal peoples of this continent, including the history of the Oneida tribe, is severely unfortunate. It does not follow, however, that a District Judge of the United States is empowered to remedy that history through the imposition of penalties against a discrete group of blameless individuals who happen to own property in central New York State. If any wrong has, in fact, been committed, it is the American people as a whole — through their elected Congress — who should redress it. The words of Chief Judge Urbom in *United States* v. *Consolidated Wounded Knee Cases*, 389 F. Supp. 235 (D. Neb. and S.D. 1975) are worth repeating:

[17] It is also worth noting that even the District Court specifically stated that the action would be better resolved by the Indian Claims Commission or by Congress. 434 F. Supp. at 531.

> [White Americans may] ask themselves questions: How much of the sins of our forefathers must we rightly bear? What precisely do we do now? Shall we pretend that history never was? Can we restore the disemboweled or push the waters of the river upstream to where they used to be? Who is to decide? White Americans? The Native Americans? All, together? A federal judge? . . .
>
> Feeling what *was* wrong does not describe what *is* right. Anguish about yesterday does not alone make wise answers for tomorrow. Somehow, all the achings of the soul must coalesce and with the wisom of the mind develop a single national policy for governmental action.
>
> I feel no shirking of duty in saying that formulation of such a national policy should not be made by a federal judge or the handful who may review his decision on appeal.

389 F. Supp. at 238-239.

To summarize, the conclusions of law which have been reached in the novel context of this action have succeeded only in working a greater injustice than the "wrong" they presumably intended to rectify. This Court should grant the petition in order to review the judgment of the court below.

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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